

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs August 20, 2008

**MARCUS E. ROBINSON v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Montgomery County**  
**No. 40200545 Michael R. Jones, II, Judge**

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**No. M2007-02642-CCA-R3-PC - Filed March 25, 2009**

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The petitioner, Marcus E. Robinson, appeals from the Montgomery County Circuit Court's denial of his petition for post-conviction relief from his guilty pleas to two counts of especially aggravated robbery and two counts of attempted murder and sentence of forty-eight and one-half years. The petitioner contends that he received the ineffective assistance of counsel because his attorney did not fully explain the ramifications of a guilty plea and did not seek a separate sentencing hearing under Blakely v. Washington, 542 U.S. 296 (2004). We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. McMULLEN, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Marcus E. Robinson.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; John Wesley Carney, Jr., District Attorney General; and Helen Owsley Young, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The opinion on direct appeal of the petitioner's convictions states:

The issues raised in this appeal stem from a June 17, 2002 incident in which the Defendant robbed a pawn shop in Clarksville and repeatedly stabbed two of the shop's employees with a knife, seriously wounding both. In September of 2002, a Montgomery County grand jury indicted the Defendant for two counts of Class A felony especially aggravated robbery, see Tenn. Code Ann. § 39-13-403, and two counts of Class A felony attempted first degree murder, see id. at § 39-13-202.

In February of 2003, the Defendant entered open pleas of guilty to both counts of especially aggravated robbery and indicated he wished to proceed to trial on the attempted murder charges. At this first guilty plea hearing, the Defendant was thoroughly advised of the rights he was waiving by submitting guilty pleas. He was also advised that he faced a sentence between fifteen and fifty years. The Defendant acknowledged that he understood the consequence of his pleas. The prosecutor summarized the facts of the case against the Defendant as follows. On the evening of June 17, 2002, the Defendant entered the St. Bethlehem Pawn Shop in Clarksville and stated he was waiting for a friend. The Defendant made no attempt to hide his identity, and one of the store clerks would testify she had seen the Defendant in the store on a prior occasion. The two clerks began to close the shop for the day; one clerk, Ms. Jessica Givens, proceeded to the back of the store to lock up some jewelry while the other clerk, Ms. Sandra Marrero, remained in the front. Ms. Marrero was on the phone with her husband when she “suddenly felt sharp pains in her back, turned around to find the Defendant swinging a knife at her.” Ms. Marrero would testify that she saw that her attacker’s knife had a red bandana tied around it. The Defendant repeatedly stabbed Ms. Marrero, and she fell to the floor screaming. Ms. Givens, hearing the screams, rushed to the front of the store, but as she did the Defendant chased after her and subsequently stabbed her multiple times.

The prosecutor stated that the evidence would show that Ms. Givens’ injuries included: a cut on her right shoulder; a cut on her right elbow; two cuts on her hand; the “tip of the middle finger almost cut off”; and a stab wound to the back of her neck. Ms. Marrero’s injuries included: four stab wounds to the back “one of which punctured the lung”; a cut along her jaw line; a cut on her hand “to the bone”; and a wound in her leg. Both victims were initially transported to a local hospital and then to Vanderbilt Hospital in Nashville. Ms. Marrero was in Critical Care for four days.

The prosecutor further stated that the evidence would show that a 911 call was received at 5:55 p.m., and witnesses at an IGA store across the street from the pawn shop would testify that they observed the Defendant leaving the pawn shop. The police arrived at the crime scene within minutes of the 911 call, and based on the victim’s descriptions of the Defendant, his clothes, and the car he drove away in, a BOLO (Be On the Look Out) was issued. Approximately fifteen minutes after the BOLO was issued the

Defendant was detained, identified by the witnesses from the IGA store and arrested. A search conducted incident to the arrest led to the discovery of a “large sum of money” which fell from the Defendant’s pant leg and was covered in what appeared to be blood. The only property stolen during the robbery was cash from the store register totaling less than \$500.

The Defendant was “Mirandized” and offered a statement to the police in which he recounted that he went into the pawn shop to look for speakers and “the next thing he remembered, was being very hot, just feeling very hot and then he stated that he remembered wrestling with the woman in the pawn shop and seeing a knife and blood and running out.” The Defendant then went to a gas station and cleaned up, picked up his girlfriend and her children, and shortly thereafter was stopped and arrested by the police. The police drove the route the Defendant stated he took and found “the knife still wrapped in the red bandana.” The Defendant’s girlfriend would testify that this knife was “identical” to one missing from her house and would also state that the red bandana was “similar” to one that she had at her house.

Additionally, the State submitted that it was prepared to produce DNA analysis results which would show that the blood on the knife and bandana belonged to Ms. Marrero, and blood found on the Defendant’s shoes belonged to the “victim.”<sup>1</sup> Further scientific testing and analysis revealed that fingerprints found on the knife and bandana belonged to the Defendant.

The Defendant acknowledged at his plea hearing that he wished to proceed with his guilty pleas based on the facts as stated by the prosecution and further acknowledged that he understood all of the rights he was forfeiting by entering guilty pleas. When asked if he had sufficient time to consider his decision the Defendant replied, “Yes, sir.” The Defendant pled guilty to two counts of especially aggravated robbery, and the trial court accepted his pleas.

Less than a month later, in March of 2003, the Defendant filed a pro se motion to withdraw his guilty pleas alleging ineffective assistance of counsel, and several days later filed a motion for the court to appoint new counsel. In December of 2003, the Defendant’s

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<sup>1</sup>The record does not specify which of the two victim’s blood was found on the Defendant’s shoe.

second attorney filed an amended motion to withdraw guilty pleas, asserting the Defendant “felt he was forced to plead guilty.” In January of 2004, an evidentiary hearing was conducted on the Defendant’s motion to withdraw guilty pleas.

At this hearing, the Defendant’s counsel first noted for the record that the Defendant was proceeding with his motion to withdraw guilty pleas “against [counsel’s] advice.” The Defendant then testified that the basis of his motion was: “I believe I was misrepresented and-when given the pleas, and that all the options wasn’t [sic] explored before the plea was entered and I was pretty much forced to plea.” The Defendant further testified that he was not told he was going to plead guilty until the morning of the plea date, and that it was not his decision to enter guilty pleas. On cross-examination, the Defendant elaborated on his claims, stating that his trial counsel lied to him and his mother,<sup>2</sup> “didn’t represent [the Defendant] to the fullest of his ability,” and did not explore the possible defense that the Defendant was on drugs the day of the crime. When asked why he pled guilty, the Defendant responded: “Because [trial counsel] told me to.”

The trial court denied the Defendant’s motion to withdraw his guilty pleas, noting that the Defendant’s pleas were entered knowingly, understandingly and voluntarily. The court agreed that the facts of the case were, as the Defendant’s trial counsel acknowledged at the plea hearing, “overwhelming.” The court further found that the Defendant “failed to establish ineffective assistance of counsel; he has shown nothing to establish that [trial counsel’s] advice was not within the range of competence demanded of attorneys in criminal cases.” The court concluded: “No one forced [the Defendant] to enter the pleas; he did so on the advice of his counsel. Now he has changed his mind.” Accordingly, the court found the Defendant “failed to meet his minimum burden of presenting evidence to establish that any fair and just reason exists for granting the withdrawal of his guilty pleas.” The court therefore denied the Defendant’s motion to withdraw his pleas. A notice of appeal was timely filed. At a second guilty plea hearing in January

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<sup>2</sup>While not articulately explained, it seems the basis for the Defendant’s allegation that his counsel “lied” to him and his mother was that counsel allegedly told the Defendant the plea agreement ultimately accepted was his best option, and then told the Defendant’s mother that there were other courses of action that could be taken, such as negotiating for a better plea.

of 2005, the Defendant entered pleas of guilty to both charges of attempted first degree murder.<sup>3</sup>

A sentencing hearing was conducted in March of 2005. As a preliminary matter, the Defendant's motion for a merger of his two especially aggravated robbery convictions was granted. The Defendant testified that he was on drugs and had made mistakes. He also admitted he violated the terms of his community corrections by committing the crimes at issue in this case while in the alternative sentencing program. The Defendant was sentenced to twenty-four years and six months for his especially aggravated robbery conviction. Pursuant to the plea agreement, the attempted murder sentences were set at fifteen years. As to manner of service, the court ordered the two attempted murder conviction sentences be served concurrently but ran the Defendant's nine-year sentence for his community corrections violation, the twenty-four-and-a-half-year robbery conviction sentence and the fifteen-year attempted murder sentence consecutive to one another for a total sentence of forty-eight years and six months. This appeal followed.

State v. Marcus E. Robinson, No. M2005-00670-CCA-R3-CD, Montgomery County, slip op. at 2-4, (Tenn. Crim. App. Apr. 5, 2006), app. denied (Tenn. Oct. 2, 2006). On direct appeal, the petitioner raised issues pertaining to the denial of his motion to withdraw his plea, consecutive sentencing, and the length of the sentences for the especially aggravated robbery convictions. This court affirmed the convictions and sentences. Id.

Before those proceedings were completed, the petitioner filed the present post-conviction action. The trial court held the matter in abeyance until the conclusion of the direct appeal process.

At the post-conviction hearing, trial counsel testified that he represented the petitioner for eight months to a year in the conviction proceedings. He estimated that he met with the petitioner approximately five to ten times during this period. He said the length of these meetings varied, but he thought the first two would have been twenty-five to thirty minutes long. He said that he got the impression that the petitioner had some mild learning disabilities and that it was somewhat difficult to get information about the facts of the crimes from the petitioner. He said, however, that he believed the petitioner had more difficulty with articulating information than he did with understanding it. He said he discussed the petitioner's special education background with the petitioner's mother.

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<sup>3</sup>On appeal, the Defendant does not challenge his pleas of guilty to the two attempted first degree murder charges, those convictions, or the length of the sentences he received for the attempted murder convictions.

Trial counsel testified that the evidence against the petitioner with respect to the especially aggravated robbery counts was particularly strong. He said that he saw absolutely no way around the especially aggravated robbery convictions and that he thought the best course was for the defendant to plead guilty to these offenses and to try to defend against the attempted first degree murder charges at trial. He said that he thought there was a possibility of convincing a jury that the petitioner was not guilty of the attempted murder charges because his mental state was such that he was incapable of premeditation, although counsel conceded that there was no question that the victims suffered serious bodily injury. He said that he was concerned about consecutive sentencing if the defendant were convicted of the attempted murder counts. He said that he thought the petitioner's guilty pleas to the especially aggravated robbery counts would be a factor which might lend some credibility to the petitioner's claim that he did not intend to kill the victims and which might be considered favorably at sentencing. He said there was also evidence which might be considered favorably at sentencing that the defendant lost his father at an early age, and had a drug problem which escalated after he reached majority and had access to settlement funds he received from his father's death.

Trial counsel testified that after the petitioner entered guilty pleas to the especially aggravated robbery counts, the petitioner and the petitioner's mother began communicating to counsel that counsel had lied to them. He said he obtained permission to withdraw from the case.

The twenty-five-year-old petitioner testified that trial counsel had met with him no more than four or five times. He said that they discussed the case and that counsel stated that he was not having luck in resolving the case. He said that counsel advised him that his only option was to plead guilty for strategic reasons. He said counsel did not explain the reason behind the strategy. He also said he did not understand what was meant by an "open plea." He said that he went to school through the eleventh grade.

The petitioner testified that after trial counsel withdrew, he was represented by a second attorney. He said that this attorney was critical of original trial counsel's tactic in having the petitioner plead guilty to the two especially aggravated robbery counts when there was only one robbery. He said that this attorney did not want to go to trial. The petitioner eventually pled guilty to the attempted first degree murder counts and received an agreed fifteen-year sentence.

The petitioner testified that he had two more attorneys who represented him. The second attorney worked on his case for about six months and met with him one time. After that, the third attorney was appointed. He met with his third trial attorney twice for about twenty minutes on each occasion to prepare for sentencing. He said he and the third attorney did not discuss mitigating factors such as learning disabilities, the plane crash in which the petitioner's father had been killed, or sentencing considerations. He said that he asked his third trial attorney to appeal his sentence and that to his knowledge the attorney did so, although they never discussed the appeal. He said the attorney sent him copies of filings relative to the appeal.

The petitioner testified that he did not understand the law and all of the steps in the litigation process until he was in prison. He said he relied on his attorneys' advice about what was in his best interest. He acknowledged that he understood the potential for him to receive a fifty-year sentence. He also acknowledged that he understood he could receive a longer sentence on resentencing if the court granted his request for post-conviction relief. He acknowledged that he was guilty of the robbery offenses. He also acknowledged that he testified at the sentencing hearing but that he did not mention his father, his level of intelligence, or his emotional problems.

The petitioner testified that the fifteen years he received for each attempted first degree murder was favorable. He said his complaint was that he thought he should not have been found guilty of both especially aggravated robbery and attempted first degree murder, not that his attorney was ineffective and obtained an unfavorable agreement for the attempted first degree murder pleas.

The trial court denied post-conviction relief. It found that the petitioner failed to prove that he had received ineffective assistance of counsel in the conviction proceedings.

On appeal, the petitioner argues that his trial counsel was ineffective for failing to explain the full ramifications of a guilty plea. He also claims counsel was ineffective for failing to explore a sentencing hearing that complied with Blakely v. Washington, 542 U.S. 296 (2004).

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland, 466 U.S. at 687; see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. When a petitioner pleads guilty, he must show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Adkins v. State, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994).

We consider first the petitioner's allegation of ineffective assistance of counsel for failing to explain the full ramifications of the guilty pleas to the especially aggravated robbery counts. We note that on direct appeal, this court considered the propriety of the trial court's denial of the petitioner's motion to withdraw his guilty pleas. In considering whether the petitioner had presented a fair and just reason for withdrawal of his guilty plea, this court stated:

[T]he transcript from the guilty plea hearing confirms that the trial court thoroughly and methodically explained the nature of the charges the Defendant faced as well as the consequence of entering a plea of guilty. The Defendant subsequently testified that he had ample time to consider his options and desired to plead guilty. The trial court found the Defendant entered his pleas voluntarily at the guilty plea hearing, and again at the evidentiary hearing on the motion to withdraw.

Marcus E. Robinson, slip op. at 6.

Notwithstanding the trial court's and this court's previous determinations that the petitioner entered his pleas knowingly, understandingly, and voluntarily, the petitioner contends that he was not informed about the consequences of his guilty pleas, that sentencing issues and options were not explained to him, and that he erroneously believed some charges would be dismissed. He contends that had he understood these things, he would not have pled guilty.

The record reflects that the petitioner was represented by the first of his three trial counsel before and at the time he entered his guilty pleas to the especially aggravated robbery counts. Counsel testified that he met with the petitioner several times and went over the case with him. He testified that he determined after investigating the facts that the petitioner's best option was to plead guilty to the especially aggravated robbery counts. The trial court found that the petitioner failed to prove that he did not understand the guilty pleas. The court noted its previous determination at the hearing on the motion to withdraw the guilty pleas "that the petitioner knew exactly what he was doing." The court ruled that the petitioner failed to carry his burden of establishing that he had not received the effective assistance of counsel.

In addition, we have reviewed the record of the petitioner's direct appeal, which contains a transcript of the guilty plea hearing. At that hearing, the trial court informed the petitioner of his rights, advised the petitioner that there was no agreed sentence for the offenses to which he was pleading guilty, informed the petitioner of the sentencing range, stated that the petitioner faced the possibility of consecutive sentencing for the outstanding charges and for the previous Community Corrections sentence, and advised the petitioner that he still faced trial for the attempted first degree murder charges. Defense counsel stated on the record that he had recommended the guilty pleas to the petitioner as a matter of strategy. The petitioner acknowledged understanding his rights and that he was making the decision to enter guilty pleas of his own accord.

Upon review, we hold that the trial court properly denied relief on this basis. The petitioner's testimony that he did not understand the plea and its consequences was contrary to the trial court's earlier determination that the petitioner understood what he was doing. Further, given the trial court's previous determination that the petitioner's pleas were knowing, understanding, and voluntary, the petition was properly denied on this basis.



The petitioner also argues that trial counsel was ineffective for failing to seek sentencing that was in compliance with Blakely v. Washington. He claims that had a Blakely issue been raised, he would not have received an enhanced sentence. According to this court's opinion on direct appeal, the trial court enhanced the defendant's especially aggravated robbery sentence based upon findings that he had a previous history of criminal convictions and that he had committed acts as a juvenile that would constitute a felony if committed by an adult. See T.C.A. § 40-35-114(2), (21) (Supp. 2002) (amended 2005, 2007). The defendant is incorrect that his sentence was not subject to enhancement. Blakely and its progeny permit judicial sentence enhancement based upon a defendant's prior criminal convictions. Blakely, 542 U.S. at 301 (applying rule of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)). This court's opinion on direct appeal reflects that the trial judge was heavily influenced at sentencing by the defendant's two felony drug convictions and two DUI convictions. Assuming that counsel did not raise Blakely at sentencing, the defendant has not explained how he was prejudiced. Given the trial court's reliance on the defendant's past convictions at sentencing, the court did not err in finding in the post-conviction proceedings that the defendant failed to carry his burden of proving ineffective assistance of counsel.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE